AZHARIN SHAARI A

v.

TABUNG HAJI PROPERTIES SDN BHD

HIGH COURT MALAYA, ALOR SETAR B
SEE MEE CHUN JC
[SUIT NO: 22NCVC-126-5-2012]
4 SEPTEMBER 2013

CONTRACT: *Sale and purchase of land - Specific performance - Whether remedy could be granted as parties fundamentally mistaken as to size of land involved - Whether purchaser entitled to refund of deposit - Whether principles relating to caveat emptor and sale on 'as is where is' basis inapplicable as vendor misrepresented size of land it was selling* C

The defendant had advertised the sale of 55.25 acres of Malay Reserve Land ('the land') in Baling, Kedah for which the plaintiff's purchase price offer of RM3 million was accepted by the defendant. The plaintiff paid the defendant a deposit of RM60,000 ('the deposit'). The plaintiff later discovered that the land area as amalgamated was only 29.5 acres and not as advertised. The plaintiff informed the defendant that in view of the misrepresentation as to the total land area, the purchase price had to be revised to RM1.628 million, which was arrived at by dividing RM3 million by 55.25 and multiplying the result by 29.5. The defendant refused to accept the suggestion and gave the plaintiff 30 days to sign the sale and purchase agreement and pay the balance deposit. The plaintiff refused to do as demanded which led to the defendant terminating the proposed agreement and giving notice of forfeiture of the deposit paid. In the instant action, the plaintiff sought specific performance of an agreement to sell 29.5 acres of the land at a purchase price of RM1.628 million. Alternatively, he sought the return of the deposit and for loss of profit and exemplary damages. In its defence, the defendant said the land was sold on an 'as is where is' basis and as the land was for development the plaintiff ought to have known that a portion of the land would be used for roads, drainage and recreation leaving a balance of 29.5 acres. The defendant also said the principle of caveat emptor applied and the plaintiff should have made the relevant searches to ascertain all relevant particulars including the land area. D E F G H

Held (ordering refund of deposit):

(1) Although the land was sold on an 'as is where is' basis, the principles of what that phrase meant did not apply to the instant case because the area that was represented for sale was 55.25 I

A acres. It was on that premise that the plaintiff made his offers and subsequently accepted the defendant's offer. As both parties intended to deal with the sale and purchase of 55.25 acres at RM3 million, the court ordered the deposit paid in the instant case to be returned to the plaintiff. (paras 11, 15 & 16)

B **(2)** There was no obligation on the plaintiff to do a search on the land area when the offer clearly stated that the area for sale was 55.25 acres. There was nothing to show the land size was other than what was shown in the advertisement and in the defendant's offer. As to the contention that the plaintiff ought to have known that a C portion of the land would be set aside for road, drainage, *etc*, the restriction in interest to that effect was in the master title of which the plaintiff did not have knowledge at the material time. Even if he had the knowledge there was no evidence the plaintiff knew the land area would be reduced to 29.5 acres. (para 11)

D **(3)** The principle of caveat emptor did not apply as the defendant had misrepresented the size of the land it was selling. The plaintiff was justified in not signing the sale and purchase agreement and in not paying the balance deposit. (para 14)

E **(4)** The claim for exemplary damages was not allowed whilst the claim for loss of profit was not proven. (para 17)

Case(s) referred to:
Holmes v. Jones [1907] 4 CLR 1702 ***(refd)***
Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd [1989] 1 LNS 15 F *HC* ***(refd)***
Richard Curtis & Co Sdn Bhd v. Khatijah Abdul Majid [2012] 7 CLJ 878 HC ***(refd)***
Star Asia Group Singapore Holding Pte Ltd v. Fung Keong Rubber Manufactory (Malaysia) Sdn Bhd [2011] 1 LNS 960 HC ***(refd)***

Other source(s) referred to:
G *Halsbury's Laws of England*, 3rd edn, vol 34, p 212

For the plaintiff - KC Ang; M/s CP Ang & Co
For the defendant - Lina Ibrahim; M/s Badrul Lee & Assocs

Reported by Ashok Kumar

H

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JUDGMENT

See Mee Chun JC:

[1] Defendant had placed an advertisement in newspapers, one of which was Harian Metro in late March 2010 to early April 2010 for the sale of land. Plaintiff saw the advertisement (B28) which read *inter alia* as follows:

> Tanah Untuk Dijual
> Kuala Kertil Baling
> Mukim: Tawar
> Daerah: Baling Kedah
> Keluasan: 55.25 ekar
> Status: Rizab Melayu.

[2] Plaintiff responded to the advertisement with an offer dated 26 April 2010 for RM2.15 million (C23) which was rejected as tender had closed. There were then discussions which led plaintiff *vide* letter dated 17 June 2010 (B26-27) to make an offer of RM3 million. A deposit of RM60,000 (deposit) was paid and a temporary receipt dated 24 June 2010 (B25) was issued. By letter dated 5 August 2010 (C34-37) defendant made an offer to sell to plaintiff on terms and conditions as stipulated. The offer and terms and conditions were accepted by plaintiff on 17 August 2010 (C38). By letter dated 31 January 2011 (C102) defendant "terminated all dealings ... in relation to said proposed sale and purchase" and gave notice to forfeit deposit.

[3] The subject land comprised 688 lots known as Lot PT No. 2570-PT No. 2973, PT No. 2976-PT No. 3261 Mukim Tawar Daerah Baling Kedah (the land).

[4] Plaintiff now claims for specific performance of the sale and purchase agreement of the land for a size area of 29.5 acres at a purchase price of RM1.628 million or in the alternative the return of the deposit, loss of profit and exemplary damages. The basis of the claim is on misrepresentation of the size of the land which plaintiff says was not 55.25 acres as advertised but 29.5 acres. In its defence defendant says the land was sold on an "as is where is basis" and as the land was for development plaintiff ought to know a portion of the land would have to be set aside for roads, drainage and recreation leaving a balance of 29.5 acres.

[5] The evidence of plaintiff was given by plaintiff himself as PW1 and Anuarudin bin Alwi (PW2) and for defendant was Mohd Azman bin Maarof Ketua Bahagian Kewangan dan Perancangan Korporat (DW1).

A **Evidence**

[6] The evidence in chief of plaintiff is that defendant's offer showed the land area to be 55.25 acres for RM3 million. He had appointed a lawyer (first lawyer) and another one in November 2011 (second lawyer). The first lawyer received the sale and purchase agreement on 14 October 2010. On 11 November 2010 five sets of S&P were sent to him for signing but they were not signed as he had not received a copy of land titles. They were received though the second lawyer on 23 November 2010. Upon checking he realised the land area as amalgamated (digabung) was not 55.25 acres. This was conveyed by email dated 28 November 2010 to DW1 (C90-91). His lawyer wrote to defendant's lawyer on 29 November 2010 (B13) requesting fair copies of titles, latest quit rent receipts and company resolution before the release of balance deposit. His lawyer wrote a letter dated 13 December 2010 (B12) suggesting that although there had been a misrepresentation of total land area the purchase price be revised on a *pro rata* basis. This was not accepted and by letter dated 16 December 2010 plaintiff was given 30 days to sign S&P and pay full purchase price within 14 days of date of S&P. Then came the termination. He knew the land had been sub-divided when he made the offer and assumed the total area was 55.25 acres. He only knew it was 29.5 acres when he did a calculation. He would not have bought if the land area was 29.5 acres.

[7] In cross-examination plaintiff said he had been involved in real estate (bidang hartanah) since 1996 and considered himself experienced in such matters. He was referred to titles to the land (C1-12) and said he had full knowledge of them. He did not agree they were from two master titles and said there were more. For the two master titles (C16-21) the express condition was kebun getah. For the titles in C1-12 the express condition was rumah berkembar with the land to be used for "satu bangunan untuk kediaman sahaja". There were restrictions in interest. He agreed the land in the 688 titles had restrictions. When he saw the advertisement he called defendant and not much information was received. He was faxed copies of title on 31 March 2010. He agreed in defendant's offer the land particulars had been inserted and the offer was "as is where is" basis. He also agreed a contract had been formed as at 17 August 2010. Copies of titles had been given to his first lawyer who had not handed over to him. As at 26 November 2010 he had the copies. The S&P had been finalised and sent to him on 11 November 2010. Land search was done by his lawyer after receiving copies of title. It could be done using title number. He had not instructed his first lawyer to do any search. Before

he made the first offer he had not made any search. The revised purchase price of RM1.625 million was calculated on RM3 million divided by 55.25 and multiply by 29.5. This was a round up figure. He had received an offer of joint venture on development of the land from Kedah Holdings (KH) dated 16 December 2010 (B8-11) and this was not conveyed to defendant. KH through PW2 had prepared the development cost as in B30 without any input from him. KH had also prepared the proposal for planning approval in B29 and the land details were not given by him. He agreed there were basic amenities in B29 and B30 was based on 55 acres minus the provision for basic amenities. He disagreed the termination by defendant was due to his failure to sign S&P but agreed as at 31 January 2011 the 8% deposit had not been paid and no S&P had been signed.

[8] In re-examination plaintiff stated he was aware of the 688 lots after he received defendant's offer of 5 August 2010. The master title was not indicated in the offer. When he received copies of titles he had not received that of the master title. With regard to "as is where is" basis referred to in defendant's offer what had been stated was 55.25 acres. Even if he had received copies of title from his first lawyer his course of action would be the same and he would still dispute the land size.

[9] The evidence in chief of PW2 was on the development cost in B30 which he prepared and showed a profit of RM11million+ to the land owner. He had not been given copies of the 668 titles when he prepared B30. Plaintiff had given him the master title lot number for him to verify from survey department. B30 was prepared using survey department's plans. The 60.51 acres was on land area and basic amenities. Land could not be developed without a part being set aside for road reserve etc. The planning cost factor was based on 55.25 acres minus the part set aside leaving 29.5 acres.

[10] The evidence in chief of DW1 essentially is that plaintiff had accepted defendant's offer of 5 August 2010 on 17 August 2010 and as that date there was a contract. The terms and conditions of offer were on the basis of "as is where is", purchase price of RM3 million, terms of payment and the location of the land as in the appendix shows the land had been sub-divided. There had been an exchange of letters and email on the S&P and defendant had sent plaintiff copies of titles to plaintiff's first lawyer. The land particulars were known to plaintiff and he ought to have made the relevant search to ascertain all relevant particulars including land area. Plaintiff ought to have known as the land was meant for development a portion would have to be set aside for road, drainage, etc. In cross-examination when referred to defendant's

offer he stated it referred to the lot numbers for 688 lots and the land area was 55.25 acres. The master title lots were not provided. Defendant could sell 688 lots with the land area of 55.25 acres. He disagreed to the suggestion defendant could not so sell as the land area was 29.5 acres. He was referred to letter of defendant dated 16 December 2010 (C98) and the letter of termination and said defendant had not denied the land area for 688 lots was 29.5 acres. In re-examination he was referred to defendant's offer and C98 wherein was stated "as is where is basis".

Finding

[11] From the evidence as set out above the size area of the land advertised for sale by defendant and its letter of offer dated 5 August 2010 was for 55.25 acres. Plaintiff's initial offer dated 26 April 2010 and his acceptance of defendant's offer on 17 August 2010 was also for an area of 55.25 acres. The contention of defendant is the land was sold "as is where is" basis and plaintiff ought to have known the land area was 29.5 acres as he could have done a land search since he had been faxed the titles to the land on 31 March 2010 and being experienced in real estate ought to have known the land being intended for development a portion would be set aside for road, drainage and etc. Although the land was sold on the basis of "as is where is" the area represented for sale was 55.25 acres. It was on that premise plaintiff made his offers and subsequently accepted defendant's offer. It does not lie on defendant to say that "as is where is" meant plaintiff bought the land represented to be 55.25 acres when it turned out to be 29.5 acres. There is no obligation on plaintiff to do a search on the land size when the offer was clear the area was for 55.25 acres in respect of 688 lots. Further there was no indication at the material time of any master titles. There was nothing to show the land size was other than what was shown in the advertisement and defendant's offer. As to plaintiff being able to know a portion of the land would be set aside for road, drainage etc the restriction on interest to this effect was in the master title which plaintiff did not have knowledge at the material time. Even if he had there is no evidence plaintiff knew the land area would eventually be reduced to 29.5 acres.

[12] Defendant had relied on the principle of caveat emptor and the cases of *Holmes v. Jones* [1907] 4 CLR 1702 and *Richard Curtis & Co Sdn Bhd v. Khatijah Abdul Majid* [2012] 7 CLJ 878. In *Halsbury's Laws of England* 3rd edn. vol. 34 at p. 212 is stated as follows:

> The rule is caveat emptor; a purchaser should make inspection and inquiry as to which he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain

> afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is a ground of objection if it is readily discovered on inspection.

In *Holmes* (*supra*) it was stated:

> It appears to me to be common sense as well as law that when a purchaser chooses to rely upon his own judgment or upon that of his agent, he cannot afterwards say he relied upon a previous representation made by the vendor.

[13] The principles in *Halsbury*'s (*supra*) and *Holmes* (*supra*) are not disputed. The facts of *Richard Curtis & Co Sdn Bhd* (*supra*) which relied on the above two propositions differ from this instant case. Both cases involve qualified title. However the critical difference is that in *Richard Curtis & Co Sdn Bhd* (*supra*) it was stated in the preamble to the S&P the land was "an area of approximately 3602 square metres" whereas in our present case the land area has been categorically stated in clear and in no uncertain terms to be 55.25 acres. There was nothing for plaintiff to take ordinary steps to ascertain the size of the land.

[14] Under the circumstances the principle of caveat emptor does not apply and defendant had misrepresented the size of land it was selling. Plaintiff was justified in not signing the S&P and not paying the balance 8% deposit within the stipulated time which then led to termination by defendant.

[15] With regard to "as is where is" to mean "I take them as I see them" (*Star Asia Group Singapore Holding Pte Ltd v. Fung Keong Rubber Manufactory (Malaysia) Sdn Bhd* [2011] 1 LNS 960) and being "without warranty or guarantee as to quality, character, condition, size, weight or kind" (*Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd* [1989] 1 LNS 15; [1989] 2 MLJ 170) these principles do not apply in our instant case. This is because the advertisement, offers from plaintiff leading to defendant's offer and plaintiff's acceptance were premised on the land being 55.25 acres.

[16] On the first part of plaintiff's claim for specific performance of the sale and purchase agreement of the land for a size area of 29.5 acres at a purchase price of RM1.628 million or in the alternative the return of the deposit I would order the return of the deposit to plaintiff. This is because both parties had intended to deal with the sale and purchase of 55.25 acres of land at RM3 million.

[17] The claim for loss of profit has not been proved. The development cost in B30 without more does not amount to proof. The claim for exemplary damages is not allowed.

Conclusion

[18] Plaintiff's claim in the alternative in para. 26(b) for the return of RM60,000 deposit is allowed and the rest of its claim is dismissed. Costs of RM20,000 to plaintiff.